1952

State of Utah v. Leo Mills : Brief of Respondent

Utah Supreme Court

Clinton D. Vernon; Richard J. Maughan; Attorneys for Plaintiff and Respondent;

7862

In the Supreme Court
of the State of Utah

STATE OF UTAH,
Plaintiff and Respondent,

vs.

LEO MILLS,
Defendant and Appellant.

Case No. 7862

RESPONDENT'S BRIEF

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INDEX

AUTHORITIES CITED

CASES CITED

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STATEMENT OF FACTS

Leo Mills, defendant and appellant herein, was charged with the crime of carnal knowledge. His trial was had before a judge and jury in the Third District Court. By a unanimous verdict the jury found defendant guilty as charged, and judgment was entered by the court accordingly.

Appellant attacks the verdict as being contrary to the preponderance of the evidence. He avers the jury disregarded the

Court's instructions numbers five, six and nine. He further alleges that the verdict was the result of passion and prejudice.

The prosecutrix at the time of the offense in question was a girl seventeen years of age. (Tr. 41). She testified that on the night of October 29th, 1951, defendant took her, in his car, to a place near the eastern terminus of 21st South Street, in Salt Lake City, where "he made me take off my pants and get in the back seat of the car." (Tr. 51). Defendant at this time had sexual intercourse with prosecutrix, rupturing the hymen. (Tr. 46-53, 53-56).

STATEMENT OF POINTS

I.

THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE VERDICT.

II.

THERE IS NO EVIDENCE THAT THE JURY DISREGARDED THE COURT'S INSTRUCTIONS.

III.

THERE IS NO EVIDENCE THAT THE VERDICT IS BASED ON PASSION AND PREJUDICE.

ARGUMENT

POINT I.

THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE VERDICT.

Appellant attacks the verdict as being contrary to the preponderance of the evidence. In *State v. Montgomery,* 37 Utah 515, 109 P 815, a case where a conviction of carnal knowledge was upheld, the court at page 816, said:

> * * * Concerning the contention that the judgment is not sustained by sufficient evidence, it is sufficient to say that the evidence with regard to the sexual act is in direct conflict. The prosecutrix most emphatically stated in her testimony that the appellant, on or about the 16th day of August, 1908, had sexual intercourse with her while she and he were out riding together in his buggy; that she never had sexual intercourse with any one else either before or after the act in question, while appellant, upon the other hand, just as emphatically denies such intercourse either on that occasion or at any other time. There are some facts in evidence which, to some extent, tend to corroborate the prosecutrix, while the evidence in corroboration of appellant's claims is much stronger. In view of the circumstances there is no escape from the conclusion that neither the prosecutrix nor the appellant could be mistanke with regard to whether the sexual act took place or not. They either had or did not have the sexual intercourse as testified to by the prosecutrix. This, no doubt, is the view the jury entertained, and thus concluded that, under all the circumstances, the statements of the prosecutrix were more worthy of belief than were those of the appellant and his witnesses, none of whom,

except the appellant, were present when the alleged offense was committed.

* * *

* * * If there is substantial evidence in support of the verdict, we are powerless to interfere with it, except upon questions of law. This is the clear import of our Constitution and has become the settled policy of this court as appears from the following, * * * (Citing Cases).

The evidence in the instant case is in direct conflict with regard to the sexual act. Prosecutrix testified that defendant had sexual intercourse with her. At page fifty-one of the record she says:

A. Well, after I got in the back seat he took off his pants, and then got on top of me.

Q. Did he have sexual intercourse with you at that time?

A. Yes, I could feel something go in at that time, and it hurt a lot.

The testimony of Dr. Joseph R. Evans, corroborates prosecutrix as to the fact of copulation. (Tr. 55).

MR. OLIVER: Yes, I will stipulate to the testimony of the doctor.

MR. TUFT: May it be stipulated Dr. Joseph R. Evans, a medical doctor, with offices and his practice in Salt Lake City — if he were called on behalf of the State he would testify that on the morning of October 30, 1951, he performed an examination of the person of [prosecutrix], at his office; that on said examination he found that there had been a

> rupture of the hymen; that there was an inflamation of the cervix; and that he found both in the interior and exterior of her body substances which appeared to him to be at that time male spermatozoa; that he took from the body of [prosecutrix] samples of said specimens and submitted them to a laboratory for examination; that the laboratory report returned to him showed that in truth and fact the said substances were male spermatozoa; that from his examination he concluded that the said [prosecutrix] had engaged in an act of sexual intercourse.

Prosecutrix also positively identified defendant as the man who had sexual intercourse with her on the night in question. (Tr. 47-52).

Defendant testified that he did not have sexual intercourse with prosecutrix on the night in question, nor had ever had intercourse with prosecutrix. (Tr. 74).

Appellant testified that he was at home the night of the offense, and that he left for California on a vacation early in the morning of the next day. (Tr. 63-71). This story, appellant claims is corroborated by the testimony of Mrs. Mills, his wife. She testified that she was home with defendant the night of the offense and that he left for California about four o'clock the morning of October 30, 1951. (Tr. 59-63). With reference to the testimony of Mrs. Mills, the court's attention is invited to that of Officer Jackson, who went twice to the home of defendant the same night Mrs. Mills says defendant was at home. His testimony is as follows: (Tr. 86, 87).

> Q. Are you testifying now you did go to the home of the defendant?

A. I testify I did go to the home of the defendant.

Q. At what time?

A. It was a little after 2:00 o'clock.

Q. Did you go in the home?

A. I went to the door of the home.

Q. Did you make any observation as to the light or darkness?

A. The home was in darkness.

Q. Did you have occasion to go back again to that home on that evening?

A. I did.

Q. At what time, Officer Jackson?

A. It was about 3:00 o'clock.

Q. And was anyone with you?

A. Yes, the father of [prosecutrix].

Q. Will you state what occured at the time you went to the home the second time?

A. The second time I went to the home, [the father of prosecutrix] was with me. I got out of my car, the police car, and went to the door and knocked, and when I knocked quite vigorously — I had to knock quite vigorously to wake up the occupants; and when I knocked at the door a little while later came down to the door Mrs. Leo Mills in an apparel of a kimona.

Q. Did you have occasion to inquire as to the whereabouts of the defendant?

A. I asked Mrs. Mills where the defendant, Mr. Mills, was at that time.

Q. Did you make known who you were?
A. Yes, Sir.

Q. And what did she answer you?

A. She said she was surprised to know where he was. She didn't know where he had gone.

Defendant further relies on the testimony of Henry Colding, (Tr. 82-85), Bernard Gordon, (Tr. 78-82), and his son, Marion Leon Mills, (Tr. 75-78), in attempting to establish his presence at his own home the night of the offense. It is to be noted that, excepting th testimony of the son, (Tr. 76), none of this evidence establishes that it was the night of October 29th, 1951, that these witnesses saw defendant at his home. (Tr. 81, 84).

From the evidence in this case, which was fully and fairly presented to the jury, certainly, we can conclude that there is substantial evidence upon which a jury would be justified in finding a verdict of guilty.

Appellant cites three cases which, he claims, support his contention, *Bufford v. State,* 25 Ala. A. 99, 141 So. 359; *People v. Keller,* 227 Mich. 520, 198 N.W. 939; *Williams v. State,* 61 Okla, Cr. Rep. 396, 68 P 2d 530. In the Bufford Case, where a conviction for homicide was set aside, the court found that the evidence was all circumstantial and that it was "so far outweighed by the proven facts, probabilities, presumptions, and indisputable exculpating circumstances — that we have reached the solemn conclusion that the verdict ought not to be al-

lowed to stand." In *People v. Keller,* a statutory rape case, it appeared to the court that prosecutrix had an ulterior motive for making the charge, that the truth of her story was rendered improbable by facts which she admitted, and which were fairly established by proof, and that prosecutrix had little regard for or appreciation of an oath; therefore, they felt it their duty to grant a new trial. The court in the Williams case reversed a conviction of rape, because it found that practically every witness for the state tended to corroborate the statement made by the defendant.

It is respectfully submitted tht none of the grounds relied on for reversal in the cases cited by appellant exist in the instant case.

POINT II.

THERE IS NO EVIDENCE THAT THE JURY DISREGARDED THE COURT'S INSTRUCTIONS.

Instructions 5, 6 and 9, are stock instructions to the effect that the testimony of prosecutrix should be weighed with care, that the testimony of defendant should be weighed the same as the testimony of any other witness, that passion and prejudice have no place in the deliberations of a jury, and that to warrant conviction of defendant every reasonable hypothesis other than that of the guilt of defendant must be excluded from the minds of the jurymen.

Respondent respectfully submits there is no evidence that the jury disregarded the above noted instructions, or any of the

instructions submitted by the court. Appellant relies only upon the evidence given by his own witnesses to sustain his claim. This, we think, we have shown to be insufficient to preclude a jury from arriving at a verdict of guilty. Appellant has not shown that the jury did not follow the mandate in these instructions.

POINT III.

THERE IS NO EVIDENCE THAT THE VERDICT IS BASED ON PASSION AND PREJUDICE.

Appellant offers no more evidence in support of his Point III, than that the prosecutrix is a White girl and defendant is a Negro man. The record discloses that defendant was afforded a fair and impartial trial. Respondent submits that an analysis of the transcript discloses that not only was there no effort on the part of the prosecuting attorney to exploit this racial difference, but that the judge was particularly attentive to the rights of the one accused. Further, no expression of the jury appears which could in any way indicate that its verdict was the product of passion or prejudice. In the absence of any appeal to racial prejudice, or to prejudice in any of its forms there is no error. 3 *Am. Jur., Appeal and Error,* § 1081 et seq. The error alleged by appellant is not supported by the record.

CONCLUSION

Respondent respectfully submits that an analysis of the

record and proceedings in this case discloses ample evidence upon which the verdict of the jury may rightfully rest, that the conviction is proper and should be sustained.

Respectfully submitted,

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